EME COURT, U. S.

SEP 15 1969

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 596

HARRY R. ILLMAN

Petitioner

v.

THE TOLEDO BAR ASSOCIATION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner herein, Harry R. Illman, prays for a writ of certiorari to review the order of the Supreme Court of Ohio, entered May 21, 1969, which indefinitely suspends petitioner from the practice of law in Ohio.

OPINION BELOW

The opinion of the Supreme Court of Ohio, Appendix A, is reported at 18 Ohio St. 2d 122. (Appendix A, pp. 13-15)

JURISDICTION

The order of the Supreme Court Of Ohio was entered on May 21, 1969, (Appendix B, pp. 16-17). On June 18, 1969, the Supreme Court of Ohio denied rehearing (Appendix C, p. 18). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), and Rule 19 of this Court, which provides for review on a writ of certiorari, "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

QUESTIONS PRESENTED

1. Was petitioner deprived of the right or privilege to practice law without a full and fair hearing as guaranteed by the Fourteenth Amendment of the Constitution of the United States where:
   (a) he was not given notice of the findings of fact and the recommendation of the Hearing Panel (the Panel that heard the evidence) to the Board of Commissioners on Grievances and Discipline, and the said Board adopted the same without any notice to petitioner.
   (b) he was not afforded an opportunity to argue rulings on evidence entered and made by the Hearing Panel, nor to be heard on the findings and recommendation of the Panel, before their adoption by the said Board.
   (c) he was not given an opportunity to be heard in mitigation of the penalty either by the Hearing Panel, the Board or the Ohio Supreme Court.
   (d) he was not afforded an opportunity to submit evidence, or to be heard otherwise, on his conduct, reputation and character for the decade prior to the alleged offense, nor for the 3 years since then, as a practicing attorney.
   (e) the "finding" that petitioner was guilty of commingling of his client's funds is not supported by the evidence, and is contrary to the testimony of petitioner corroborated by the sworn statement of two other members of the Ohio Bar and his legal secretary.
   (f) evidence and sworn statements adduced and proffered by and on behalf of petitioner were rejected and were not considered by the state court in affirming the "findings" and recommendation of the said Board of Commissioners.
   (g) the state court adjudged the guilt or innocence of the accused on the basis of greater weight of the evidence, and not on the basis of clear and convincing proof.

2. Was the penalty of indefinite suspension from the practice of law imposed by the state court upon the petitioner harsh and unreasonable under the circumstances of this case? (*Sacher v. Bar Association*, 347 U.S. 388)

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

(a) Facts Material To Consideration Of Questions Presented

Mattie Lee Humphrey, a widow 82 years of age, retained petitioner, a practicing attorney in Toledo, Ohio, to represent her in a personal injury action. The fee contract was one-third of the recovery, plus recapture of necessary expenses. (R. 46)

Thereafter the client became ill, and died of cancer. One of her daughters, Rosie L. Williams, became Administratrix. Petitioner revived the injury action, and filed a wrongful death action in the hope of proving the course of the cancer had been accelerated by the injury. He found the Administratrix an unreasonable client, suspicious of legal procedures, and critical of himself because of her mother's poor answers on deposition.

Upon the trial in early 1966, petitioner obtained a verdict of $4,000.00 for the personal injuries, but verdict was rendered for the defendant on the wrongful death action. The Administratrix was bitter about the verdict; complained that the jury was prejudiced against negroes, and unfair in denying any value to her mother in the death case. (R. 272)

The insurance carrier for defendant attempted to settle the judgment by threatening appeal, but soon tendered the full FOUR THOUSAND DOLLARS ($4,000.00) in a draft made payable to "Rosie L. Williams, Administratrix of the Estate of Mattie Lee Humphrey, deceased and Harry R. Illman, Attorney of Record." (R. 276) The draft was dated February 4, 1966. The date of actual delivery is uncertain. It was not cashed until February 16, 1966.

Meanwhile there had been conversations between attorney and administratrix as to how the estate funds should be handled. Mrs. Williams had a claim against the estate herself for funeral expenses and some flowers which she had advanced. She had instructed the attorney that she wanted these funds paid to her in cash, and not by check, for personal reasons. (R. 283).

It so happened that at that particular time petitioner had on hand a substantial amount of cash. He was planning a vacation trip to Europe in July of 1966, and had begun to save and set aside funds for that purpose in the latter part of 1965. He saved it in cash which he secreted in an envelope in the center drawer of his desk. Then on February 16, 1966, finding himself with the draft for $4,000.00 which was already twelve days past issue date, and knowing that no distribution to the creditors and heirs of the estate could be made until the claims limitation period expired on March 9, and that Mrs. Williams wanted the funeral bill and flower bills reimbursed to her in cash, he proceeded to "cash" the draft from the monies in his desk drawer.

He figured that out of the $4,000.00 he had earned his fee, which was one-third of the recovery, and was entitled to reimbursement of the expenses which he had advanced for a total due to him of ONE THOUSAND SEVEN HUNDRED TWENTY-EIGHT DOLLARS AND SIXTY-THREE CENTS ($1,728.63). So upon cashing the check, he retained FIFTEEN HUNDRED DOLLARS ($1,500.00) for himself, deciding to let the excess ride until final accounting, and segregated TWENTY-FIVE HUNDRED DOLLARS ($2,500.00) for the Estate, placing it in a pay envelope, then in turn in a larger envelope on which he wrote "Mattie Lee Humphrey Estate," and put it away in his center desk drawer. (R. 281, 282).

Petitioner's story is corroborated. Mr. Illman gave to an office associate, Attorney Kelsey Bartlett, the file to do the Probate closing. Mr. Bartlett recalled that at the time Mr. Illman turned over the estate file he told him that he had available TWENTY-FIVE HUNDRED DOLLARS ($2,500.00) in cash in a marked envelope which was to be used for the purpose of winding up the Estate. (R. 144). Mr. Bartlett also testified that in his conversations with the client he told her on several occasions the cash was available in the office to make the distribution to her and the other creditors as soon as the Probate Court approved the account. (R. 151)

Further corroboration is found in the testimony of Miss McColley, petitioner's secretary (a legal secretary for over 40 years, but who had worked for Mr. Illman only since July, 1960). She testified that Mr. Illman showed her the envelope, marked "Mattie Lee Humphrey Estate," and where it was kept in the center desk drawer.

After petitioner cashed the draft, he informed his client the money was available. (R. 280) He attempted to phone her promptly, but found she was out of the state visiting a relative. (R. 285) He then wrote her a letter enclosing copies of all the estate bills and asked her to verify them (Letter of February 23, 1966, Resp. Ex. 4). On her return from her visit he conferred by telephone and offered to pay her the cash for the funeral expense reimbursement. She admits this in her testimony, indicating that she knew he had received the check and had the cash available for her but that she had decided to wait until all the bills were in and settled before taking her money.

Petitioner then arranged for the client to come into the office to verify all the bills and expenses, and to set up the final accounting and distribution. This matter would have ended at that time, but for an unfortunate secretarial error. Miss McColley, petitioner's secretary, typed up the accounting to show a FIVE THOUSAND DOLLAR ($5,000.00) recovery rather than the true FOUR THOUSAND DOLLAR ($4,000.00) judgment. (R. 166-172)

Mrs. Williams read the papers in Miss McColley's presence, while waiting for Mr. Illman who was out of the office at the time. When she read the higher figure all her suspicions exploded and she became convinced she was being defrauded.

When Mr. Illman did come in there was a bitter argument. She demanded to know where the rest of the money was. (R. 286) Kelsey Bartlett testified that the voices were so loud he couldn't help hearing the commotion. (R. 140) Mrs. Williams was saying that Mr. Illman was cheating her, that there was more money, that "she was going to get even with him" (R. 141); that she didn't believe him on the amount; that he was stealing the extra money (R. 147), and that "She was going to do everything under the sun, she was going to get him, fix him . . . " (R. 148)

Mrs. Williams did not complain at all about Mr. Illman *cashing* the draft, which she knew about during the office argument. Her mistaken belief was that the draft was for more than FOUR THOUSAND DOLLARS ($4,000.00), and she wanted to see it for proof she was not being swindled—even though she knew the verdict was only FOUR THOUSAND DOLLARS ($4,000.00). (R. 19)

Mr. Illman agreed to get a photostat of the draft to satisfy her. But correspondence with the insurance company was unproductive and in the meantime Mrs. Williams filed a complaint with respondent, the Toledo Bar Association, which in turn resulted in the disciplinary proceedings that has brought us to this court.

(b) Procedural Background

After preliminary proceedings before the Toledo Bar Association, based on the complaint of Mrs. Williams, the respondent filed a formal complaint against the petitioner before the Board of Commissioners on Grievances and Discipline charging him as follows:

> "While acting as attorney for one Rosie L. Williams, Administratrix of the Estate of Mattie L. Humphrey, Deceased, endorsed a check payable to the Estate of Mattie L. Humphrey, Deceased, and deposited funds in the amount of $4,000.00 realized thereby to his personal checking account without authorization to so endorse and deposit said check; and that he also commingled and used said funds as his own."

In response to these charges, petitioner denied that he had cashed the draft without authority; and that he had commin-

gled any funds of the estate with his own; and stated affirmatively that he had segregated at once the estate's share of the collection and kept it segregated at all times until ultimate distribution.

The complaint was heard by a 3 member Hearing Panel appointed by and from the Board of Commissioners on Grievances and Discipline. The Hearing Panel made rulings on evidence, including rejection of evidence proffered on petitioner's prior conduct, made findings and recommendations to the said Board (which as noted previously were adopted by the Board without notice to petitioner or an opportunity for him to be heard thereon.)

From conflicting testimony regarding Mrs. Williams' instructions to the petitioner, and her conversations and communications with him, the Hearing Panel for the Board of Commissioners on Grievances and Discipline found that petitioner was without legal authority to sign the client's name as an endorsement of the draft, and concluded that he did not in fact have $2,500.00 in cash in a marked envelope as claimed, and did in fact commingle estate funds with his personal funds. From this it was concluded that petitioner's acts constituted misconduct as defined in Section 5(a) of Rule XVIII of the Rules of Practice of the Ohio Supreme Court, and recommended that petitioner be suspended from the practice of law for an indefinite period.

The Ohio Supreme Court, in turn, rejected (1) petitioner's motion to remand the proceedings to said Board of Commissioners for Rehearing; (2) tender of affidavits and statements attesting to petitioner's character and conduct as a member of the Bar, and (3) endorsed the findings and recommendation of the Board of Commissioners on Grievances and Discipline. The Ohio Supreme Court found that the placing of cash in an envelope marked for one's client's use was not sufficient to avoid the charge of violation of Canon 11 of the Canons of Professional Ethics, reasoning as follows, at page 124 of its *per curiam* opinion:

> "The mere availability of funds, on demand, does not satisfy the requirements of Canon 11. What is mandatory is strict accounting and absolute separation of the funds of the client from those of the lawyer." (18 Ohio St. 20, 122, 124)

The Ohio Supreme Court then suggested that the petitioner could have avoided his dilemma by depositing the draft "in a separate trust account and so recording it in an office ledger." It is interesting to note that in endorsing the Board's recommendation for punishment, the Ohio Supreme Court observed, "we next consider his professional record" (p. 124), even though it had refused to give the petitioner an opportunity to be heard on the matter of his character, professional conduct and the like.

On June 18, 1969, the Supreme Court of Ohio denied rehearing of its order indefinitely suspending the petitioner from the practice of law. This petition for a writ of certiorari has followed.

HOW FEDERAL QUESTIONS PRESENTED

The questions here involved were first put in issue on January 31, 1969, when the petitioner moved the state court for an order referring the proceeding back to the Board of Commissioners on Grievances and Discipline for rehearing and reconsideration. The issues were again raised on April 1, 1969, in the petitioner's brief in support of objections to findings and recommendations of the Board of Commissioners on Grievances and Discipline. The questions involved were again raised on June 2. 1969, when the petitioner requested the state court to grant a rehearing for the purpose of reconsidering its decision of May 21, 1969. On each occasion when such issues were raised by the petitioner, the issues were briefed by the petitioner and by the respondent, The Toledo Bar Association.

REASONS FOR GRANTING THE WRIT

Whether the practice of law is termed a right or a privilege, a disciplinary proceeding must afford due process of law under the Fourteenth Amendment of the Constitution of the United States. *In Re Ruffalo*, 390 U.S. 544 (1968) and *Speyack v. Klein*, 385 U.S. 511 (1967). See an Annotation "Suspension or revocation of medical or legal professional license as violating due process–federal case." (98 L. Ed. 851); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

It is submitted that the failure to give notice of the findings of fact and recommendations made by the Hearing Panel; failure to provide an opportunity to argue rulings of evidence by the Panel; failure to give petitioner an opportunity to be heard in mitigation of the penalty (assuming validity of the charges); and determination of guilt or innocence based upon the greater weight of the evidence, each constituted denial of due process to the petitioner.

The Ohio procedure is ambiguous and uncertain on the question of submission of character evidence. The Ohio Supreme Court has held that such evidence should be presented to the Board of Commissioners (which in effect means the Hearing Panel). While the Hearing Panel says it is not relevant and in the instant case at least sustained motions seeking to keep from the record evidence concerning the petitioner's prior conduct. See, also, the following:

1. *Bar Ass'n v. Herzog,* 173 Ohio St. 313, 181 N.E. 2d 880 (1962).
"... this court is now asked to accept the proffer of certain statements of various individuals expressing their opinions concerning the respondent's character and reputation. These are inadmissible at this time inasmuch as the court is considering the matter on the record made at the hearing before the panel." 181 N.E. 2d at 881.
2. *Bar Ass'n v. Ellis,* 175 Ohio St. 538, 196 N.E. 2d 769 (1964).
"The claimed mitigating circumstances urged by respondent should have been presented at the hearing before the board and not having been so presented cannot for the first time be asserted in and considered by this court." 196 N.E. 2d at 770.

It has been generally held that character evidence should be given weight in considering the sanction to be imposed. Note the following:

1. *In re Heirich,* 10 Ill. 2d 357, 140 N.E. 2d 825 (1957)
"... where the evidence is conflicting and the charge does not import criminality or moral turpitude the court should give weight to such testimony of good reputation." 140 N.E. 2d at 841.
2. *In re Ratner,* 194 Kan. 362, 399 P. 2d 865 (1965)
"... where accusations do not import venality ... or where there is conflicting evidence ... the testimony of responsible citizens as to the reputation and character of the accused may not be wholly ignored. Evidence of such a character is entitled to consideration and must be given weight." 399 P. 2d at 876.

3. *State v. Steger*, 433 P. 2d 225 (1966)

"We would be remiss in our duty if we did not give careful and thoughtful consideration to the evidence of good character and reputation of the Respondent, and his exemplary professional standing for over thirty years." 433 P. 2d at 227.

4. *The Florida Bar v. Goodrich*, 212 So. 2d 764 (1968)

"A lawyer's excellent record of public service both to his community and his profession does not excuse professional misconduct; however, it does tend to suggest that an individual so committed and so oriented professionally is not likely to do willful violence to ethics of profession and that such an individual is amenable to minimal corrective measures in event of an unintentional misprision." Headnote No. 2.

Another fundamental failure on the part of the Ohio procedure involving disciplinary proceedings against members of the bar involves the holdings of the Ohio Supreme Court that such proceedings are civil in character and there therefore the quantum of proof necessary to support a finding of guilt as charged is simply by a preponderance of the evidence. See *Bar Ass'n v. Ruffalo*, 176 Ohio St. 263, 199 N.E. 2d 396 (1964); *Bar Ass'n v. Fleck*, 172 Ohio St. 467 (1961); and *In re Lieberman*, 163 Ohio St. 35 (1955). While on the other hand, under the Federal rules and decisions, disciplinary proceedings have been characterized as "quasi-criminal" in nature, and that therefore the proof must be "clear and convincing." See *In re Ruffalo*, 390 U.S. 544; *In re Gladstone*, 28 F. Supp. 858 (S.D.N.Y.–1939); *In re Ryder*, 263 F. Supp. 360 (1967), affirmed 381 F. 2d 713, as follows:

"In proceedings of this kind [i.e., to determine whether an attorney should be removed from the roll of attorneys qualified to practice before a federal district court] the charges must be sustained by clear and convincing proof, the misconduct must be fraudulent, intentional, and the result of improper motives." 263 F. Supp. at 360.

Actually, whichever test is applied (i.e., preponderance of the evidence or clear and convincing proof), the record does not support a finding of guilty of commingling of funds as held by the Ohio Supreme Court. Petitioner gave a reasonable and plausible story of the cashing of the draft and segregation

of his client's funds, which is not refuted in the Record but as noted earlier which was corroborated by everyone in a position to know the truth of the assertion. Certainly reasonable men might differ as to whether or not petitioner's conduct was proper, or whether or not an attorney has authority to sign his client's name on a draft made payable to both of them. The observation of Justice White and Justice Marshall in the course of their concurring opinion *In Re Ruffalo*, 390 U.S. 544, is relevant, at pp 555-6 thereof, as follows:

> "... The appraisal of petitioner's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question. I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct."

Assuming for sake of argument that petitioner is guilty of the charge set forth in the complaint, is the penalty assessed warranted? Or, is it unduly harsh and severe? There is no claim that petitioner committed any fraud on his client, or defaulted on any obligation, or withheld or converted any funds of his client. On the contrary, he did a good job with a most difficult, suspicious, demanding, and exasperating client.

Contrast the action of the Ohio Supreme Court in the instant case with the penalty imposed in other, more aggravated situations, e.g.,

1. *Bar Ass'n v. Vann*, 168 Ohio St. 481, 155 N.E. 2d 922 (1959)

   Client turned over two checks to attorney for delivery to realty company; attorney failed to deliver; client demanded return of money; attorney returned money to client. Panel found attorney guilty of misconduct, recommended indefinite suspension. Supreme Court of Ohio, found punishment too severe; reduced sanction to public reprimand, "in view of the previous good conduct."

2. *Bar Ass'n v. Robinson*, 175 Ohio St. 536, 196 N.E. 2d 784 (1964)

   Client hired attorney for collection matter. Attorney collected but failed to remit money to client, converting money to his own

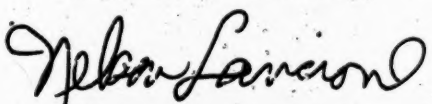
use; after complaint filed with Bar Association, attorney remitted all but $270.00. Attorney admitted charges saying client never demanded money promptly and that he (attorney) was careless; Board of Commissioners found attorney guilty of misconduct and recommended indefinite suspension. Ohio Supreme Court reduced sanction to public reprimand saying: "... a public reprimand will be an adequate discipline and will secure the public and the Bar from the danger of repetition of such misconduct or of any other breach of professional misconduct on the part of respondent." 196 N. E. 2d at 786.

See also *Bar Ass'n v. Lichota*, (1968) 15 Ohio St. 2d 217, 219; "'This Court is not yet ready to say that indefinite suspension or permanent disbarment follows automatically upon a showing that an attorney has been convicted of a crime involving moral turpitude.'"; and from other jurisdictions, the following: *State v. Krumme*, 41 Wis. 2d 775, 165 N.W. 2d 148 (1969); *In re Nadelson*, 31 A.D. 2d 280, 297 N.Y.S. 2d 324 (1969); *State v. Steger*, Okl., 433 P. 2d 225 (1966); *In re Lentz*, 46 A. 761 (1900); *Zitny v. State Bar of California*, 51 Cal. Rptr. 825, 415 P. 2d, 521 (1966); *The Florida Bar v. Budzinski*, 217 So. 2d 108 (1968); *Hodge v. New York State Bar Association*, 31 A.D. 2d 661, 295 N.Y.S. 2d 385 (1968); *In re Gilbert*, 30 A.D. 2d 369, 292 N.Y.S. 2d 132 (1968) and *In re Pennington*, 440 P. 2d 175 (1968).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Toledo Bar Association *v.* Illman

[Cite as Toledo Bar Assn. v. Illman, 18 Ohio St. 2d 122.]

Attorneys at law–Misconduct–Commingling client's funds with his own–Acts warranting suspension from practice for indefinite period.

(D. D. No. 95–Decided May 21, 1969.)

On Certified Report by the Board of Commissioners on Grievances and Discipline.

Respondent, Harry R. Illman, represented Mrs. Mattie L. Humphry, plaintiff in a personal injury action. Mrs. Humphry died while the case was pending, and respondent revived the action in the name of Rosie L. Williams, her daughter, for whom he secured an appointment as administratrix of Mrs. Humphry's estate. The cause was tried and resulted in a verdict and judgment in the amount of $4,000 for the plaintiff.

On February 4, 1966, the defendant's insurance carrier issued its draft for $4,000 payable to Rosie L. Williams as administratrix and respondent as attorney of record. Respondent endorsed the draft, signing both his own name and the name of Rosie L. Williams as administratrix. He thereafter deposited the draft in a checking account which was used for respondent's personal as well as office affairs, and which was the only bank account respondent had at the time.

The complaint filed by relator charges respondent with violation of Rule XIX of the Rules of Practice of this court and Canons 11 and 32 of the Canons of Professional Ethics in endorsing the name of the administratrix to the check without authorization, commingling the proceeds thereof with his own funds, and using the proceeds for purposes other than those of his client.

Respondent does not dispute these facts which led to the filing of this complaint, but alleges that Mrs. Williams gave

him authority to endorse her name on the draft by stating, in connection with the suit and administration, that she wanted him to "handle it" for her. He contends that there was no commingling or misuse of a client's funds for the reason that he placed cash from another source, $2,500 in the form of twenty-five $100 bills, in an envelope marked "The Mattie L. Humphry Estate" in the unlocked, center drawer of his desk, and informed his secretary and office associate that it was for their use in the event it was needed in the case while respondent was in Europe on vacation. Respondent states that the balance of the $4,000 was for his fee and advances of litigation expenses.

From conflicting testimony regarding Mrs. Williams' instructions, and her conversations and communications with respondent, and his asserted practice of maintaining large amounts of cash in his desk drawer, the Board of Commissioners on Grievances and Discipline found that respondent was without legal authority to sign the client's name as an endorsement of the draft, and concluded that respondent did not in fact have $2,500 in cash in a marked envelope as claimed, and did in fact commingle estate funds with his personal funds. The board found that respondent's acts constituted misconduct as defined in Section 5(a) of Rule XVIII of the Rules of Practice of this court, and recommended that he be suspended from the practice of law for an indefinite period.

The matter is before this court upon the findings and recommendations of the board, and upon respondent's objections thereto.

Mr. Jamille G. Jamra, for relator.

Messrs. Spangenberg, Hasenflue, Shibley & Tract, Mr. Craig Spangenberg and *Mr. Nelson Lancione,* for respondent.

Per Curiam. It is undisputed that respondent deposited at least $2,500 of his client's funds in his personal checking account and spent a large portion thereof for his own use. His assertion that he took $2,500 of his personal cash on hand and placed it in an envelope marked for his client's use does not excuse this clear violation of Canon 11 of the Canons of Professional Ethics, which provides:

"Money of the client or collected for the client or other trust property coming into possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

The mere availability of funds, on demand, does not satisfy the requirements of Canon 11. What is mandatory is strict accounting and absolute separation of the funds of the client from those of the lawyer. See *Ohio State Bar Assn.* v. *Gray* (1965), 1 Ohio St. 2d 97, 98, 204 N. E. 2d 683.

Respondent's present position could have easily been avoided if the draft had been deposited in a separate trust account and so recorded in an office ledger, and while we need not decide the question under the instant facts, the dispute relative to endorsement authority could likewise have been avoided if respondent had secured his client's simple written statement granting him that authority.

Having concluded from the evidence that respondent violated Canon 11, we next consider his professional record and are of the opinion that the board's recommendation for the disposition of this matter is well taken. Judgment is therefore rendered suspending respondent from the practice of law for an indefinite period.

Judgment accordingly.

Matthias, Acting Chief Justice, **Troop, Gray, O'Neill, Schneider, Herbert and Duncan, JJ.**, concur.

Troop, J., of the Tenth Appellate District, sitting for **Taft, C. J.**

Gray, J., of the Fourth Appellate District, sitting for **Zimmerman, J.**

APPENDIX B

THE STATE OF OHIO	**The Supreme Court of the State of Ohio Of the Term of January, 1969**
City of Columbus,	**To-wit: May 21, 1969**
The Toledo Bar Association, *Relator,*	**ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**
v.	
Harry R. Illman, *Respondent.*	**DD No. 95**

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on December 9, 1968, recommending that the respondent, Harry R. Illman, should be indefinitely suspended from the practice of law pursuant to Section 6 (b) of Rule XVIII of the Supreme Court of Ohio; and it further appearing that respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this cause was argued by counsel. On consideration thereof, it is ordered and adjudged by this Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and the same hereby is, confirmed and the respondent, Harry R. Illman, is indefinitely suspended from the practice of law.

The respondent, Harry R. Illman, is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that the respondent, Harry R. Illman, surrender his Certificate of Admission to Practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, Harry R. Illman, pay the costs of these proceedings taxed in the amount of One Thousand One Hundred Five Dollars and Twenty-four cents ($1,105.24).

It is further ordered that the Clerk of this Court issue certified copies of this entry as provided for in Section 19, Rule XVIII of the Rules of Practice of this Court.

APPROVED: */s/ Kingsley Taft.* **CHIEF JUSTICE**

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal 49.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 21st day of May, 1969.

THOMAS L. STARTZMAN CLERK

/s/ Sam F. Adkins DEPUTY

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1969 TERM

City of Columbus. To wit: June 18, 1969

The Toledo Bar Association,
Relator,

vs. **No. DD 95**

Harry R. Illman, **REHEARING**
Respondent.

It is ordered by the court that rehearing in this case is denied, and the stay of execution is hereby terminated.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copies from the records of said Court, to wit, from Journal No._____ Page _____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of June, 1969

THOMAS L. STARTZMAN Clerk

By /s/ Sam F. Adkins Deputy.

APPENDIX D

IN THE SUPREME COURT OF OHIO

THE TOLEDO BAR ASSOCIATION
Relator

vs.

HARRY R. ILLMAN
Respondent

(Motion for Remand to Board of Commissioners on Grievances and Discipline and for Rehearing and Reconsideration)

Case No. DD 95

MOTION

Now comes the respondent through his attorneys and respectfully moves the court to make the following orders herein, for the reasons set forth in the attached memorandum:

1. That the court order the Board of Commissioners to receive further evidence and record it in the transcript; or, in the alternative to refer the matter back to the panel to hear and record further evidence.

2. That the court permit respondent to submit, and to incorporate in the transcript, testimony or affidavits from judges, referees, fellow attorneys, Rabbis and others as to respondent's good conduct as an attorney and excellent professional character for at least a decade before the present charges were filed.

3. That the court vacate the existing Findings of Fact and Recommendation until further evidence is received and until respondent is given an opportunity to appear and to be heard before the Board of Commissioners. Respondent requests that he be given leave to file brief and to have argument on the merits on the present transcript and Findings of Fact and Recommendation, in the event this motion is denied.

/s/ Craig Spangenberg
CRAIG SPANGENBERG
Spangenberg, Hasenflue, Shibley & Traci
1500 National City Bank Building
Cleveland, Ohio 44414

/s/ Nelson Lancione
NELSON LANCIONE
42 East Gay Street, Suite 1312
Columbus, Ohio 43215

ATTORNEYS FOR RESPONDENT

APPENDIX E

THE STATE OF OHIO,
City of Columbus

1969 TERM

The Toledo Bar Association,
Relator,

To wit: Wednesday, March 12, 1969

vs.

No. DD 95

Harry R. Illman,
Respondent.

On Motion to Remand to BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

This cause pending before this Court on a Certified Report filed by the Board of Commissioners on Grievances and Discipline and upon consideration of the motion, filed by counsel for Respondent, to vacate the findings of fact and recommendation filed by the Board; to refer such case back to the Board to hear and record further evidence and to permit respondent to submit affidavits regarding respondent's good conduct and professional character, it is ordered by this Court that this motion be overruled.

It is further ordered that the respondent shall file objections and a brief in support thereof to the recommendation by the Board on or before April 1, 1969.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copies from the records of said Court, to wit, from Journal No. _____ Page _____.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 12th day of March, 1969.

THOMAS L. STARTZMAN, Clerk.

By /s/ Sam F. Adkins Deputy.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari was mailed with first class postage prepaid to Jamille G. Jamra, Esq., 240 Huron Street, Toledo, Ohio, on the eleventh day of September, 1969.

Nelson Lancione

NELSON LANCIONE
42 East Gay Street, Suite 1312
Columbus, Ohio 43215
ATTORNEY FOR PETITIONER

SUPREME COURT, U. S.

FILED
OCT 8 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 596.

HARRY R. ILLMAN,

Petitioner,

vs.

THE TOLEDO BAR ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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1018 United Savings Building,
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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 596.

HARRY R. ILLMAN,

Petitioner,

vs.

THE TOLEDO BAR ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

Respondent The Toledo Bar Association opposes the petition filed herein for a writ of certiorari and prays that such petition be denied.

QUESTIONS PRESENTED.

The questions presented for review, as stated by petitioner, are not accurately "expressed in the terms and circumstances of the case" (see paragraph 1 (c) of Rule 23). The inaccuracies are noted *infra* in respondent's statement of the case.

STATEMENT OF THE CASE.

Respondent sets forth here certain facts material to the consideration of the petition for writ of certiorari which were not included in petitioner's statement or which were inaccurately presented therein.

The Supreme Court of Ohio found that petitioner violated Canon 11 of the Canons of Professional Ethics by depositing his client's funds in his one and only checking account (Petitioner's Appendix A, pp. 13-15). These facts and the fact that he endorsed his client's name on the settlement draft were freely admitted by petitioner in his testimony given before the hearing panel of the Board of Commissioners on Grievances and Discipline (Appendix, p. 10, *infra*). It is also undisputed that respondent's bank account, as shown by the reconciliation statement therefor (Exhibits 23 and 23A), reached the very low figure of $9.81 on May 11, 1966.

Inasmuch as the fact of commingling was established by respondent's own testimony, it seems unnecessary, for the purposes of this brief in opposition to the petition for a writ of certiorari, to narrate other evidentiary matters involved in these proceedings which were omitted from petitioner's statement of the case and which relate to certain of the evidence referred to therein by him.

Contrary to the statements made by petitioner in his petition to this Court and the inferences therefrom apparently intended by him (see Petition, pp. 7 and 9), the record of the proceedings before the hearing panel of the Board of Commissioners establishes that *respondent,* not petitioner, offered evidence pertaining to the prior conduct of petitioner as an attorney at law, that such evidence was rejected by the hearing panel *upon objection made by petitioner,* and that petitioner *voluntarily refrained* from offering at such hearing materials relating to his prior conduct (Appendix, pp. 10-11, *infra*). Incidentally, these

materials consisted of *ex parte* written statements or letters, and a great number of such testimonials was placed by petitioner before the Supreme Court of Ohio.

The evidence proffered by respondent with respect to petitioner's prior conduct related to proceedings in the Court of Common Pleas of Lucas County, Ohio, which resulted in 1952 in an order suspending petitioner from the practice of law for a period of five years. This evidence is a part of the record and was proffered by respondent to the Supreme Court of Ohio for consideration in connection with the imposition of a penalty once misconduct was determined.

Inasmuch as petitioner has placed in issue whether due process of law was accorded under the disciplinary procedure prescribed by the Supreme Court of Ohio, a brief outline of the pertinent provisions of Rule XVIII of the Supreme Court of Ohio is in order.

This procedure provides for notice to the attorney of the nature of the charge made against him, a formal hearing before a hearing panel of three members of the Board of Commissioners, the right to counsel, the observance of all rules of evidence at such hearing, the preparation of a transcript of such hearing, the review of the entire proceedings by the full Board of Commissioners, the right to file written objections with the Supreme Court of Ohio to the report certified to it by the board, and a hearing before the court on any such objections. The respective responsibilities of the board and of the court in disciplinary proceedings were made clear by the Supreme Court of Ohio in *Mahoning County Bar Association vs. Ruffalo,* 176 Ohio St. 263 (1964), at 263-264, 199 N.E.2d 396, at 398, when it said:

> "In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this

Court. However, this Court has full responsibility for determining what the facts are and what action should be taken on those facts."

REASONS FOR NOT GRANTING THE WRIT.

Petitioner states that he seeks a writ of certiorari under Rule 19, which authorizes a review "where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court." (Petition, p. 1.)

Petitioner cites authority in his petition showing that this Court has held the constitutional right to due process of law applicable to disciplinary proceedings involving a lawyer. With this proposition respondent readily agrees. Petitioner must be said to seek a writ of certiorari only on the basis that the state has decided a federal question of substance "in a way probably not in accord with applicable decisions of this Court."

In *Dohany vs. Rogers,* 281 U.S. 362 (1930), this Court made the following pertinent observation at page 369:

> "The due process clause does not guarantee to the citizens of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Reetz v. Michigan,* 188 U.S. 505, 508; *Hurwitt v. North,* 271 U.S. 40; *Bauman v. Ross,* 167 U.S. 548, 593; *Backus v. Union Depot Co., supra,* p. 569."

More recently, it was said in *Federal Trade Commission vs. National Lead Co.,* 352 U.S. 419 (1957), at 427:

> "It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them. *Morgan v. United States*, 304 U.S. 1 (1938)."

A brief review of the proceedings undertaken by petitioner under Rule XVIII of the Supreme Court of Ohio demonstrates quite convincingly that due process of law was accorded to and fully utilized by him. Petitioner took the depositions of three witnesses before the matter was assigned for hearing before the hearing panel appointed by the Board of Commissioners on Grievances and Discipline. He attended the formal, full hearing before the hearing panel and offered numerous exhibits and the testimony of three witnesses in addition to his own. He was represented by able counsel. The entire proceedings were transcribed and later the matter was fully argued before the hearing panel by petitioner through his counsel, both by written brief and by subsequent oral argument. After the Board of Commissioners certified its report to the Supreme Court of Ohio and made its recommendations with respect thereto, petitioner submitted his written objections and supporting brief to the Supreme Court of Ohio in accordance with its rule, and, after oral hearing before that court, a judgment was ultimately entered therein. Thereafter petitioner filed a motion for rehearing, which was submitted to the court on written briefs and subsequently overruled.

It is obvious from the foregoing review of the procedures undertaken by petitioner that he exploited to the fullest his opportunity to present his defense in this matter, and that he had full opportunity to do so.

It is true, as stated on page 9 of the petition herein, that the hearing panel sustained motions seeking to keep from the record evidence concerning petitioner's prior

conduct, but it should be noted that the motions were made by *petitioner* with respect to evidence *proffered by respondent.* Petitioner can hardly be heard to complain of the panel's refusal to admit evidence which he successfully asked the panel to reject.

Moreover, as petitioner stated on the first page of the addendum to his brief filed in the Supreme Court of Ohio with his written objections to the certified report of the Board of Commissioners, he voluntarily refrained from submitting to the hearing panel many of the testimonials favorable to petitioner (which, incidentally, were proffered to the Supreme Court of Ohio with this addendum) (see Appendix, *infra*, p. 12). Certainly, petitioner cannot properly complain of his own reluctance to avail himself of the opportunity to offer before the panel such evidence as he deemed advisable with respect to his prior conduct and character.

Petitioner has cited authorities to the effect that character evidence should be given weight in considering the sanction to be imposed. Obviously, these authorities relate to the penalty or discipline to be imposed once the violation of the canons or the misconduct is found. Respondent agrees that petitioner's character and record of prior conduct are pertinent to the determination of the type of discipline to be imposed once the misconduct has been determined, and the Supreme Court of Ohio made it clear in the last paragraph of its opinion that, once misconduct was found, petitioner's professional record was considered by the court in determining what discipline should be imposed (Petitioner's Appendix A, p. 15). Clearly, petitioner cannot have been deprived of due process of law when in fact his character and prior record were given consideration in determining the type of discipline to be imposed.

Petitioner next complains of the fact that the Supreme Court of Ohio has held proof by a preponderance of the evidence sufficient to sustain a finding of misconduct (Petition, p. 10).

It should be pointed out that the three cases cited by petitioner on page 10 of his petition, *In re Ruffalo,* 390 U.S. 544, *In re Gladstone,* 28 F. Supp. 858, and *In re Ryder,* 263 F. Supp. 360, all concerned disciplinary procedures within the federal court system itself and did not concern the quantum or character of proof necessary in state court disciplinary proceedings. In fact, nothing is said in the *Ruffalo* decision, 390 U.S. 544, regarding the quantum of proof necessary in disciplinary proceedings, although it appears in the petition (p. 10) as being cited in support of the proposition that proof in such proceedings must be clear and convincing.

In *Leland vs. Oregon,* 343 U.S. 790 (1952), this Court held that the fact Oregon imposed a heavier burden of proof on an accused to establish his insanity than by a preponderance of the evidence, as is required in some other states, was not a difference of such magnitude as to raise a constitutional question. See also Mr. Justice Black's opinion in *Powell vs. Texas,* 392 U.S. 514 (1968), where at page 545 he refers to "the indefensibility of imposing on the States any particular test of criminal responsibility."

Reference is also made to *Speiser vs. Randall,* 357 U.S. 513 (1958), at 523, where this Court again acknowledged the power of a state, within fundamental principles of justice, "to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."

Petitioner next says that, whichever burden of proof may be imposed, the evidence does not support the finding

of commingling. Even if his admission of the deposit of the client's draft in his one and only bank account must be ignored, to require this Court to review and weigh the evidence in order to determine whether it would have come to the same conclusion as did the Supreme Court of Ohio is far more than due process of law requires. Petitioner had full opportunity to offer evidence in his defense and avail himself of every opportunity to defend himself against the charges lodged against him. The requirements of due process were fully satisfied, and petitioner has no basis to complain in this regard.

The leading case of *Selling vs. Radford*, 243 U.S. 46 (1917), although dealing with disciplinary proceedings in the federal court system, has long been recognized as laying down the rule defining the limits of a review by this Court of decisions of state courts in disbarment proceedings. At pages 50-51 of its opinion in the *Selling* case, this Court said:

> "* * * That is to say, we are of opinion that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2. That there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

None of these three conditions exists in the instant case.

Petitioner's next and last complaint that the penalty of indefinite suspension is unwarranted and unduly harsh is entirely without merit. In fixing the penalty, the Supreme Court of Ohio probably took into account, in its consideration of petitioner's professional record, the order of the Court of Common Pleas of Lucas County, Ohio, in 1952, which suspended him from the practice of law for five years.

The handling of a client's funds is a major responsibility of every lawyer. Any mishandling thereof cannot be treated lightly, for trustworthiness is fundamental to the practice of law and the maintenance of a good attorney-client relationship.

CONCLUSION.

It is earnestly maintained that petitioner has failed to show any grounds for the granting of a writ of certiorari and that his application therefor should be denied.

Respectfully submitted,

CHARLES E. IDE, JR.,
and
JAMILLE G. JAMRA,
Attorneys for Respondent.

APPENDIX.

Excerpts From Transcript of Proceedings Before Panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

November 13, 1967.

Testimony of Mr. Harry Illman upon cross examination, page 293 of transcript:

Q. Now, this Toledo Trust Account which has been identified as bearing No. 0096292 which carried the label "Business Account," is the only account that you had at any bank in February of 1966, wasn't it? A. I think that's right.

Q. And you used this account for your business purposes as well as your personal matter, is that right? A. That's true.

Q. The endorsement of Rosie William's name on the draft, Exhibit 1A, was in your handwriting, isn't it? A. Yes.

Q. And the check was—that draft was deposited in this account of yours with Toledo Trust Company on February 16, 1966, is that correct? A. I believe that's right.

* * * * *

Offer and rejection of Exhibits 13 and 14 relating to prior disciplinary proceedings involving Mr. Harry Illman:

Mr. Jamra: * * * Relator's Exhibit 13, are the original charges and specifications filed in the Court of Common Pleas, Lucas County, Ohio, in Cause No. 175689, in the Matter of the Complaint against Harry R. Illman, filed October 1, 1952.

Mr. Dreidame: Are you offering this one at this time; is there an objection to it?

Mr. Lancione: I understand he's just marking them now.

Mr. Dreidame: Okay; very well.

Mr. Jamra: In Relator's Exhibit 14, it is the original Journal Entry in the same Cause Number 175689, filed on December 2, 1952. * * *

Mr. Jamra: I'll offer Exhibits 13 and 14.

Mr. Lancione: I'd like to object separately as to both 13 and 14.

First of all, as to the reasons indicated as to the previous exhibits on the question of relevancy and materiality, and with respect to Exhibit 13 an additional basis for the objection on that, being, that all that recites is charges and specifications.

I don't know of any basis for bringing to the attention of this panel charges as such. The Journal Entry will speak for itself. I've had an opportunity to review it to the extent that the charges and specifications have been found well taken, and I would assume that they would be reflected in the Journal Entry.

Seems to be inappropriate in addition to the Journal Entry, assuming the materiality of what Mr. Jamra is presenting in Exhibit 14; would be inappropriate also to add charges and specifications without something more, and I would move separately that Exhibit 13 for the reasons I've indicated—

Mr. Dreidame: At this time the panel will sustain the objection. If in a later stage of the proceedings the opinion of the panel is that these have become material by anything else that is introduced or developed, there could be a change in the ruling; but, at this time the ruling is that the objection is sustained—that is, to 13 and 14.

* * * * *

Excerpt from page one of Addendum to Brief Filed on Behalf of Mr. Harry Illman in Supreme Court of Ohio.

While many of the attached letters were in the possession of counsel for respondent [Mr. Illman] at the time of the hearing, he was reluctant to tender them into the Record in view of the Panel's ruling on the relevance of evidence pertaining to previous disciplinary action involving Respondent.

* * * * *

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 596

HARRY R. ILLMAN

Petitioner

v.

THE TOLEDO BAR ASSOCIATION

Respondent

REPLY BRIEF ON BEHALF OF PETITIONER

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ATTORNEYS FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969
No. 596

HARRY R. ILLMAN

Petitioner

v.

THE TOLEDO BAR ASSOCIATION

Respondent

REPLY BRIEF ON BEHALF OF PETITIONER

This brief is submitted on behalf of the petitioner in reply to the brief of respondent. Under "Statement Of The Case," respondent tends to confuse its conclusions derived from the facts as adduced and the facts themselves. For instance, the respondent recites that "commingling" was established as a "fact" because the petitioner "admitted" that he signed the draft in question, that he deposited it in his bank account and that thereafter the bank account reflected balances lower than the amount of the draft.

The glaring omission from the "facts," of course, is petitioner's testimony—supported in critical part by his secretary and by his office associate—that he had in fact cashed the draft from funds available in his office and had segregated in cash in a separate properly identified envelope kept in his office desk more than enough to cover any claim which the complainant might have against the proceeds of the draft. So, that when he deposited the draft in his account he was in fact depositing his own funds, and therefore the status of his bank account thereafter was completely irrelevant.

Respondent persists in refusing to acknowledge or to admit that the essence of the case against the petitioner is the refusal of the hearing panel, or the Board of Commissioners

on Grievances and Discipline or the Ohio Supreme Court to believe petitioner's testimony under oath as to the cashing of the draft, even though his testimony is supported by credible evidence in the Record and there is no evidence to the contrary—only doubt.

Respondent is correct in stating that it was petitioner's objection which resulted in the hearing panel rejecting evidence of petitioner's misconduct which had been offered by respondent, and that it was because of this ruling that the petitioner made no offer or tender to the hearing panel of evidence concerning his reputation and conduct at the bar. Nowhere in petitioner's opening brief is there a statement made to the contrary. Petitioner's objection which was sustained by the hearing panel was based upon the fact that the respondent was offering the record of prior charges against petitioner as part of its evidence in chief against him in the instant proceeding, which was completely unrelated to the earlier record.

The hearing panel properly sustained the petitioner's objection to the introduction of such evidence at that particular time. Petitioner then anticipated that such evidence and other evidence reflecting upon petitioner's conduct and character would be considered not in determining the petitioner's guilt or innocence but solely in the event that guilt was established for the purpose of weighing the penalty that should be recommended or administered. The question which the Record presents on this point is, do the due process requirements of the law assure to the accused an opportunity to be heard in mitigation of penalty so that he may offer evidence as to his prior good conduct and character?

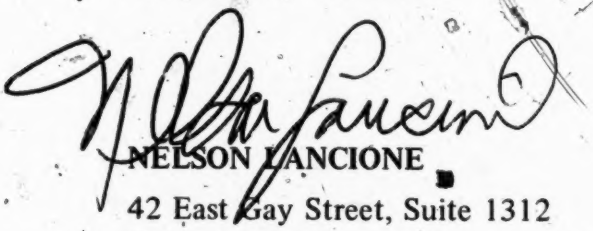
It is no answer to this question to refer, as respondent has, to the comment of the Ohio Supreme Court made at the conclusion of its opinion that it considered petitioner's "professional record" in accepting the Board's recommendation on the penalty. Obviously, the Ohio court was referring to the disciplinary action in which petitioner had been involved years previously (and the evidence concerning which had been rejected by the hearing panel), and not to the affidavits and statements submitted by the petitioner evidencing his subsequent good conduct and professional standing. The lower

court's comment in this regard would appear to strengthen petitioner's contention that he was deprived of a fair and equal opportunity to be heard, since consideration was given only to the "bad" and not to the "good."

In challenging petitioner's charge that he has been denied due process of law, and in supporting its contention that the petition for writ of certiorari should not be allowed, respondent relies heavily on the case of *Selling* v. *Radford,* 243 U.S. 46 (1917). Petitioner accepts that challenge. Every test suggested in the course of the *Selling* opinion is met here.

(1) The state procedure, not as enunciated in the rules but as applied to the petitioner, denied to petitioner an opportunity to be heard;
(2) the record is devoid of "proof of facts," that would give rise to a clear conviction that petitioner was guilty of professional misconduct as charged; and
(3) to permit petitioner to stand indefinitely suspended from the practice of law "would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principals of right and justice, we were constrained so to do."

Respectfully submitted,



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END